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No. 88-463

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH E. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

Petitioner,

v.

UNITED INTER-MOUNTAIN
TELEPHONE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW[1]

Whether a federal court can vacate an arbitration award which fails to draw its essence from the negotiated terms of the collective bargaining agreement?

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[1]In satisfaction of the requirements of United States Supreme Court Rule 28.1, United Inter-Mountain Telephone Company's parent corporation and holding company is United Telecommunications, Inc.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

Respondent United Inter-Mountain Telephone Company (hereinafter referred to as the "Company" or "Employer"), hereby responds to and opposes the issuance of a writ of certiorari to review the per curiam decision of the United States Court of Appeals for the Sixth Circuit. Respondent also incorporates, by reference, the Brief in

Opposition filed by S.D. Warren Company in Case Number 88-462 on November 18th, 1988.

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STATEMENT OF THE CASE

In the summer of 1984, as part of a company-wide reduction in force, Employer reduced its Outside Plant Engineering (OSPE) workforce by six employees. OSPE staff work out of five district offices located within a 100 mile radius of Kingsport, Tennessee. The OSPE Manager analyzed the staffing needs for each district and selected the requisite six positions to be reduced. Five of the six were non-bargaining unit employees; only one (the grievant, Shirley Taylor) was a member of the bargaining unit represented by the Petitioner (hereinafter "CWA" or "Union").

Ms. Taylor (the grievant) was one of three clerical employees working in OSPE's district office located in Kingsport, Tennessee. Ms. Taylor's duties involved both simple drafting and general clerical work. Historically, both bargaining unit and non-bargaining unit personnel have performed the clerical and drafting work. Grievant's job duties were previously performed by a non-bargaining unit employee. The second employee, Ms. Ruth Bates, a non-unit employee, was assigned difficult and complex drafting work. The third, Ms. Yolanda Wolfe, was employed as a clerk-stenographer (also a non-unit employee). She spent her time performing the majority of the office's extensive clerical and stenographic work.

Analyzing the three, the Company decided to eliminate the "swing" position (Ms. Taylor) and to retain the employee most skilled in drafting (Ms. Bates) and the employee most skilled in clerical and stenographic duties (Ms. Wolfe). Therefore, in May, 1984, the Company advised Ms. Taylor that she would be laid off effective June 2, 1984, unless she chose to displace (or bump) a junior employee in the same (or lower) job classification. Ms. Taylor refused the offer to continue in the same job classification at the same pay in another office less than twenty (20) miles away and, instead, voluntarily elected layoff. The Union then filed a grievance on Ms. Taylor's behalf.

Arbitration

The grievance was processed through all four steps of the grievance procedure. Unable to resolve the grievance, the Union requested that it be submitted to arbitration. The parties presented the following issue to Arbitrator Marlin M. Volz:

> Did the Company *violate the agreement* when it removed the grievant Shirley Taylor from her position as Engineering Clerk-Drafting from the Kingsport, Tennessee office on or about June 2, 1984, resulting in her layoff, and if so, what should be the remedy? (App. 11a, emphasis added).

The arbitrator concluded that Ms. Taylor was laid off, that her job classification was not eliminated, and that the Employer's decision to leave a job classification unfilled was not, in itself, a violation of the agreement. (App. 20a). The arbitrator then found that Employer was authorized

to remove Ms. Taylor from her position under the management rights clause:

> 25.02 Except as may be modified or restricted *by the terms of this Agreement* or by applicable labor laws, the Company shall have the exclusive right to: direct and supervise the Company's plant and buisness operations and policies; . . . assign, modify or change work duties or requirements, [and] layoff for lack of work or other proper reason. (Article 25, § 25.02 quoted at App. 15a, emphasis added).

In summary, the arbitrator found that Employer ". . . required no additional affirmative contractual authority" for its action and concluded that "the burden was upon the Union to point to one or more contractual limitations upon managerial authority which *made it contractually impermissible* for the Company to have done what it did". (App. 21a, emphasis added). The arbitrator then reviewed all of the provisions cited by the Union for its argument that it was contractually impermissible for the Company to lay off Ms. Taylor.

First, he found the recognition clause (§ 1.01) ". . . not directly helpful to the Union" because it did ". . . not define work jurisdictional boundaries". (App. 21a). Second, he found that neither the doctrine of overlap (a position argued by the Employer based upon the fact that both unit and non-unit employees had historically performed the same work) nor Section 18.03 (a work jurisdiction clause argued by the Union). ". . . control[ ] the selection of the employee to be retained when one of the two must be laid off." (App. 23a). Third, he concluded that Section 18.04 did not apply to a layoff. (App. 23a). Finally,

having found no express limitation, he concluded that "the contractual provision which must be applied, since other provisions do not apply, is the management rights clause found in Article 25." (quoted above, App. 23a).

Notwithstanding his earlier conclusions, that the only applicable contract clause was "management rights" and that Employer "required no additional affirmative contractual authority," the Arbitrator reframed the issue and turned to an "implied" limitation on management's rights. (App. 21a). The arbitrator found an "implied" limitation of good faith and fair dealing in the recognition clause (§ 1.01) and the work jurisdiction clause (§ 18.01). (App. 23a). Based upon this implied limitation, he stated that the "ultimate issue boils down to this: did the Company act reasonably when it chose Ms. Wolfe for retention instead of the grievant, Shirley Taylor." (App. 23a).

Despite his prior determinations that the recognition clause, the seniority provision, and the work jurisdiction clause (§ 18.03) were inapplicable where an Employer was selecting between a unit employee and a non-unit employee, the arbitrator, nevertheless, used these same provisions to support his conclusion that the Employer should have retained Taylor (the unit employee) rather than Wolfe (a non-unit employee).

First, he found the recognition clause, Section 18.01, and Section 18.03, "by *implication* state a preference, where a choice must be made for the preservation of work for the bargaining unit." (App. 23a, emphasis added). He found it "reasonable" to recognize Taylor's greater years of service. (App. 24a). He also postulated that as

a result of the layoff, the "remaining employees may be called upon from time to time to perform a wider range of duties than formerly" and, therefore, the Employer should, in his opinion, have kept "Ms. Taylor . . . the most versatile of the two".[2] (App. 24a). Finally, having found that the Employer's argument based upon the overlapping of duties between unit and non-unit employees inapplicable, he then used that fact to support his preference for Ms. Taylor stating that "work falling within the doctrine of overlap is to be shared between the two units, bargaining and non-bargaining, and is not to be given entirely to one." (App. 24a). Having concluded, based upon his perception of the Company's needs, that it was more reasonable for the Company to retain the unit employee rather than a non-unit employee, he sustained the grievance and ordered the grievant reinstated with back pay.

Motion To Vacate

The United States District Court for the Eastern District of Tennessee vacated the arbitrator's award holding that the arbitrator "substituted his own judgment for that of the Employer's; and 'dispensed his own brand of industrial justice'" by abandoning the contract and picking the employee the Arbitrator felt would best suit the Employer's future needs. (App. 8a). The United States

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[2]Even if the Employer were selecting for layoff from among two unit employees, seniority (years of service) would not control because the collective bargaining agreement provides that qualifications and fitness to perform the available work are a proper basis for retaining a junior employee over a senior employee and it was undisputed that Ms. Taylor was not qualified to perform all of the tasks required of a clerk-stenographer like Ms. Wolfe. (Article 7, § 7.04, quoted at App. 20a).

Court of Appeals for the Sixth Circuit affirmed the district court in a *per curiam* decision.

The overriding question for this Court is whether this case illustrates a conflict in the circuits requiring Supreme Court resolution (as asserted by the Petitioner) or presents an issue raising novel or unsettled questions of law which would justify granting the petition for writ of certiorari. Respondent submits that it does not.

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REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI

I. Limitations On A Court's Authority To Review Arbitration Awards Are Well Settled Law

Almost three decades ago, in the *Steelworkers Trilogy*,[3] this Court set forth the basic tenents applicable to judicial review and enforcement of labor arbitration awards. It is now axiomatic that arbitration is the favored means of resolving labor disputes and that an arbitrator's interpretation of a collective bargaining agreement is entitled to great deference. Nevertheless, an arbitrator's authority is not unbridled.

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long

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[3]*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

> as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Enterprise Wheel & Car Corp., 363 U.S. at 597.

Since 1960, this Court has twice examined the *Trilogy's* standard. In 1983, this Court stated:

> [A] federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. When the parties include an arbitration clause in their collective bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement," a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous.

W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers, 461 U.S. 757, 764 (1983) (internal citations to *Enterprise Wheel & Car* omitted). Last term, this Court gave new emphasis to the *Trilogy* standard in *United Paperworkers v. Misco, Inc.*, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

There can be no dispute that the standard of review in these cases is well-settled. This case, therefore, presents no novel or unsettled questions of law that would justify granting a writ of certiorari.

II. This Case Raises No Important Question Of Federal Law Warranting Review

The Petitioner argues that a writ of certiorari should issue in this case because (it claims) the Sixth Circuit has

vacated arbitration awards in "sixty percent of its recent published decisions." (Pet. 8). It should first be noted that the Sixth Circuit does not publish every decision. Only those decisions which meet the Sixth Circuit Court of Appeals criteria are published. (Sixth Cir. Ct. R. 24(a)). Because of the deference accorded arbitral awards, a case overturning an arbitration award is more noteworthy than one enforcing an award. This fact alone suggests a simple explanation for the disparity in numbers of published cases vacating an arbitrator's award and the published cases enforcing awards.

Respondent is also mystified by Petitioner's attempt to obtain this Writ of Certiorari based, in part, upon a novel application of the "disparate impact" theory to lower court decisions. In essence, Petitioner is saying that this Sixth Circuit decision is suspect because of an alleged disparity of prior decisions based upon percentages drawn from a limited sampling.[4] Although a novel argument, it is wholly without merit.

Even if a disparity existed in the number of decisions enforcing versus those vacating arbitral awards, it does not suggest that this particular case raises an important question of federal law warranting review. In the present case, the District Court for the Eastern District of Tennessee and the Sixth Circuit Court of Appeals simply ap-

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[4]Twenty-five (25) cases is not a sufficiently large number to make a statistically valid analysis. Further, even accepting Petitioner's allocation of the decisions, and using Petitioner's statements, the percentage is overstated. There are only 13 published decisions vacating an award and ten enforcing the award "since 1979." Respondent did not deem it appropriate to utilize a data base search to identify and cite cases not published under Sixth Circuit Court Rule 24(a).

plied the well-settled principles of the *Trilogy* and *Misco* to the particular facts of this case. In vacating this award, the lower courts did not depart so far from accepted standards to call for this Court's exercise of its power of supervision.

The district court's decision was based upon its articulation of the *Trilogy*. (App. 4a). Both parties called the Circuit's attention to *Misco* before oral argument. The court acknowledged that arbitrator's awards are due great deference and "[a] reviewing court has no authority to weigh the merits of the grievance and to substitute its own judgment for that of the arbitrator's." (App. 4a). However, the court acknowledged that judicial deference is not absolute. Courts have no choice but to refuse to enforce an award where the arbitrator failed to confine himself to the interpretation and application of the collective bargaining agreement. The decision reflects adherence to these principles.

In the present case, the court did not substitute its contractual interpretation for that of the arbitrator. Rather, the arbitrator failed to confine himself to the interpretation and application of the contract and without any authority to do so, substituted his judgment for that of the Company. The collective bargaining agreement (by its terms) is applicable only to unit employees. The parties contractually agreed to submit disputes regarding "the interpretation or violation of express provisions" of the agreement to arbitration. The parties submitted such an issue to the arbitrator asking:

> "Did the Company *violate the agreement* when it removed the grievant Shirley Taylor from her position . . . resulting in her layoff?"

The arbitrator initially answered that question negatively. He concluded that Ms. Taylor was laid-off, that leaving a job classification unfilled did not constitute a violation of the labor agreement and that management had expressly retained the authority to "direct and supervise the Company's plant" and to "layoff for lack of work or other proper reason." (App. 20a-21a). He determined that the only applicable contract provision was the management rights clause. He concluded that management had the authority under that clause to layoff the grievant. Having answered the question submitted for arbitration, the arbitrator's authority ceased.

However, despite express limitations upon the arbitrator's authority, he sought to answer a question which was not submitted for arbitration and involved persons not subject to the collective bargaining agreement. In doing so, the arbitrator was no longer "even arguably construing or applying the contract or acting within the scope of his authority." *Misco,* 109 S.Ct. at 370, 98 L.Ed.2d at 299. Nor was he properly "looking for guidance from other sources." *Enterprise Wheel & Car,* 363 U.S. at 597. The arbitrator's assessment of the relative merits of a non-unit employee and suppositions about the variety or nature of the work the Company expected the remaining non-unit employees to perform were simply not based on, nor drew their essence from, the collective bargaining agreement. The arbitrator was simply "dispensing his own brand of industrial justice" based upon his personal

perceptions. *Id.* Therefore, the award was properly vacated and presents no important question of federal law warranting review.

III. There Is No Conflict Among The Circuits

There is no "square and irreconcilable" conflict among the circuits requiring Supreme Court resolution, as asserted by Petitioner. Petitioner's argument (incorporated by reference) for the existence of a conflict among the circuits is based solely upon decisions wherein an employer challenged an arbitrator's authority to mitigate the discipline imposed by an employer who had carried its burden of showing that the employee had engaged in misconduct. On this issue, there is no conflict. None of the discharge cases[5] cited by Petitioner as supporting its conclusion that a conflict exists contain statements rejecting or criticizing the Sixth, Tenth or First Circuit decisions with which they allegedly conflict. To the contrary, the cases cited in support of a conflict expressly rely upon Sixth Circuit decisions as precedent.

In *Kane Gas Light & Heating v. Int'l Bhd. of Firemen & Oilers, Local 112,* 687 F.2d 673 (3d Cir. 1982), the Third Circuit acknowledged agreement with one Sixth Circuit decision addressing the authority of an arbitrator to mitigate a discharge, *Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co.,* 630 F.2d 474 (6th Cir. 1980). In *Nestle* the arbitrator found the employee had refused a direct

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[5]The cases referred to are those which the Petitioner incorporated by reference from the arguments made by the United Paperworkers International Union in their petition for a writ of certiorari in *Paperworkers v. S.D. Warren Co.* (88-462).

order on three occasions. Despite the fact that the agreement provided insubordination "shall" constitute cause for discharge, the arbitrator ordered the employee reinstated. The Sixth Circuit found the arbitrator had exceeded his authority by declining to enforce the discharge. In *Kane Gas,* the employer argued, based on *Nestle,* that the arbitrator exceeded his authority by failing to sustain the employer's right to discharge an employee for insubordination. Rejecting the employer's argument because the arbitrator had not found the employee insubordinate, the Third Circuit stated:

> *Nestle,* however, merely stands for the proposition—*with which we fully agree*—that an arbitrator's decision should be vacated when the arbitrator finds facts that constitute grounds for discharge under the collective bargaining agreement, but in disregard of those facts and the terms of the agreement, refuses to uphold the discharge.

Kane Gas Light & Heating, 687 F.2d at 680 (emphasis added).

Petitioner has failed to consider Sixth Circuit decisions which reach the same conclusion and are consistent with the Third, Fifth, Seventh and Eighth Circuit decisions holding that an arbitrator's award cannot be vacated simply because management has expressly reserved certain rights which are arguably infringed upon when an arbitrator mitigates a discharge. One such case is *Timken Co. v. Steelworkers,* 492 F.2d 1178 (6th Cir. 1974). In *Timken* the Sixth Circuit enforced an arbitrator's award reinstating an employee who had been discharged for violating a rule prohibiting an employee from striking another employee. The arbitrator found the discharged em-

ployee had "technically" violated this rule. The arbitrator ordered the employee reinstated. The employer, unsuccessfully challenged the reinstatement as a violation of its reserved rights. The Court stated with reference to the management rights clause,

> It cannot follow from such reserved power that a legitimate dispute could not arise with respect to the method or manner in which the company should exercise its managerial functions or *the imposition of penalties in individual cases.*

Id., 492 F.2d at 1179 (emphasis added). Thus, the Sixth Circuit has concurred in the position that an arbitrator's award cannot be vacated simply because management has expressly reserved certain rights which are arguably infringed upon when an arbitrator reinstates a discharged employee.

The Sixth Circuit's decision in *Timken* was expressly relied upon by the courts of appeal in two of the four cases cited by Petitioner as indicative of the conflict in the circuits: *Arco-Polymers, Inc. v. Local 8-74, OCAW*, 671 F.2d 752 (3d Cir. 1982) and *Kewanee Machinery v. Local Union No. 21, Int'l Bhd. of Teamsters*, 593 F.2d 314 (8th Cir. 1979). Contrary to Petitioner's assertion, no conflict has been shown.

Nor can it be argued that *Timken* was an aberration. In 1985, the Sixth Circuit reiterated its adherence to the position taken in *Timken* in the case of *Ford Motor Co. v. Plant Protection Assoc. National*, 770 F.2d 69 (6th Cir. 1985). Likewise, in *Anaconda Co. v. Dist. Lodge No. 27, Int'l Assoc. of Machinists*, 693 F.2d 35, 37-38 (6th Cir. 1982) and *Industrial Mutual Ass'n v. Amalgamated Wor-*

kers, Local Union No. 383, 725 F.2d 406 (6th Cir. 1984) the Sixth Circuit rejected arguments that arbitrators exceeded their authority by mitigating a discharge.

Petitioner has also failed to consider decisions of the Third, Fifth, Seventh and Eighth Circuits holding that arbitrators exceed their authority by mitigating a discharge. For example, in *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood*, 715 F.2d 405 (8th Cir. 1983), the Eighth Circuit held that an arbitrator exceeded his authority by reinstating a discharged employee. The court observed that "the arbitrator's opinion reflected the arbitrator's efforts to balance the equities of the situation rather than to interpret and apply the agreement." *Id.*, 715 F.2d at 409. The Court vacated the award stating:

> Nowhere does the agreement give the arbitrator the authority to determine the fairness or equity of the company's discipline. * * * [T]here are no tensions between sections inherent in the agreement and no ambiguities within the sections. The agreement is not susceptible to any construction beyond its plain meaning. * * * While the Company's form of discipline may have been severe, this fact is neither the arbitrator's nor our concern.

Id., 715 F.2d at 409. *See also, HMC Management Corp. v. Carpenters Dist. Council*, 750 F.2d 1302 (5th Cir. 1985); *Young Radiator Co. v. Int'l Union UAW*, 734 F.2d 32 (7th Cir. 1984).

Petitioner further seeks to show that the Sixth Circuit has developed an aberrant standard of review for arbitral awards based upon commentator criticism of a 197 Sixth Circuit decision, *Detroit Coil Co. v. International Assoc. of Machinists & Aerospace Workers Lodge #8*

594 F.2d 575 (6th Cir. 1979). This position is not substantiated. *Detroit Coil* and other Sixth Circuit's decisions are, in fact, often relied upon by other circuit courts, even those courts with which they allegedly conflict.

In *United Elec. Radio & Mach. Workers v. Litton,* 704 F.2d 393 (8th Cir. 1983), the Eighth Circuit (a court whose decisions allegedly conflict with the Sixth Circuit's analysis) relied upon *Detroit Coil,* as well as a Third Circuit decision (another court whose decisions allegedly conflict with the Sixth Circuit's analysis) in vacating a portion of an arbitral award. The dissent, however, relies upon a different Sixth Circuit decision (*General Telephone Co. v. Communications Workers of America,* 648 F.2d 452, 457 (6th Cir. 1981)) to argue that the award should be enforced.

Similarly, Judge Posner, writing for the Seventh Circuit, approved the Sixth Circuit's decision in *Ford Motor Co.* stating:

> Once the dispute is shown to be within the scope of the arbitration clause, the only question for the court is whether the arbitrator was interpreting the collective bargaining agreement; only if he was not interpreting it, but instead was applying his own ideas of what was fair and equitable, *as in Ford Motor Co. v. Plant Protection Ass'n Nat'l,* 770 F.2d 69, 75-76 (6th Cir. 1985), can the court vacate the award.

Dreis & Krumpt Mfg. v. Int'l Ass'n of Machinists, 802 F.2d 247, 253 (7th Cir. 1986) (emphasis added).

The Seventh Circuit, in *Jones Dairy Farm v. Local No. P-1236, United Food and Commercial Workers,* 760 F.2d 173 (7th Cir. 1985), cited *Local Union 59, I.B.E.W. v.*

Green Corp., 725 F.2d 264, 268-69 (5th Cir. 1984) and *American Fed. of Television & Radio Artists, Cleveland Local (AFTRA) v. Storer Broadcasting Co.*, 745 F.2d 392, 398-99 (6th Cir. 1984) for the proposition that courts are to accord deference even to an arbitrator's interpretation of the parties' legal rights. *Ethyl Corp. v. United Steelworkers of America*, 768 F.2d 1800 (7th Cir. 1985) cited with approval, *Morgan Services, Inc. v. Local 323, Chicago & Central States Joint Board*, 724 F.2d 1217, 1222-24 (6th Cir. 1982), in support of the position that an "arbitrator may not modify the contract unless authorized to do so." Likewise, the Fifth Circuit has cited *Storer Broadcasting Co. v. AFTRA, Cleveland Local*, 600 F.2d 45, 47 (6th Cir. 1979) for the proposition that an "arbitrator may not disregard or modify plain and unambiguous provisions of the agreement." *Teamsters, Local Union 657 v. Stanley Structures*, 735 F.2d 903, 905 (5th Cir. 1984).

These decisions illustrate that the Sixth Circuit's decisions are a viable source of law, not an aberration. Moreover, none of the cases cited by Petitioner rely upon *Misco*. Respondent submits that even if a conflict had existed, as Petitioner itself admits, "[a]ny doubt as to the meaning of the *Trilogy* with respect to the scope of judicial authority to enforce a court's understanding of the 'express language' of a collective bargaining agreement should have been laid to rest . . . by this Court's decision in *Misco*." (Paperworkers Petition for Writ at 20).

Petitioner has, therefore, simply attempted to create the impression of a conflict by the selected citation of pre-*Misco* cases reaching differing results. The fact that the circuits have reached a different conclusion in a particular

case or type of case is not indicative of a conflict regarding the arbitrator's authority or the appropriate standard of review. Application of *W. R. Grace, Misco* or the *Trilogy* to particular cases necessarily produces different results, both within each circuit and among the circuits. Differing results are caused by differences in the particular collective bargaining agreements and the facts to which they apply.

The most that can be shown is that lower courts had, pre-*Misco*, used slightly different language in their efforts to espouse whether a particular award "draws its essence from the collective bargaining agreement." Nevertheless, all have attempted to apply the *Trilogy's* well-settled standards. The minor differences reflected in these various articulations of what constitutes grounds to vacate an award do not represent a conflict in the circuits requiring Supreme Court resolution. Nor do these differences pose a threat to the integrity of the finality of arbitral awards. As stated by Elkouri & Elkouri in their book, *How Arbitration Works* (4th ed. 1985):

> The Supreme Court's "essence" standard is sufficiently inexact to present close cases and invite honest differences of opinion as to whether the boundary of the merits has been seriously breached. Absent any evidence of calculated intent by the courts to breach the boundaries prescribed in the *Trilogy*, the basic status of arbitration should not be impaired seriously by some unintended or chance breaches. *Id.*, at 32.

There is no evidence of such a calculated intent to breach the boundaries prescribed in the *Trilogy* or subsequent reiterations of the proper standard of review. Further, there is no evidence of a conflict in the circuits.

More importantly, any alleged conflict illustrated by these cases are inapplicable to the present case. The present case does not involve a discharge decision. It is not even a disciplinary case. This case is purely one of "contract interpretation." Petitioner's attempt to "piggy-back" on the simultaneously filed Paperworkers Petition (88-462) is wholly without merit. Even if it were assumed that the above-cited cases are indicative of a conflict among the circuits on this issue, granting a writ of certiorari in the present case would not provide the Court an opportunity to resolve that conflict.

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CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

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OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

Joseph F. Spaniol, Jr.,
Clerk of the Court

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479-3011

October 6, 1988

Steven E. Kramer, Esquire
Hunter, Smith & Davis
Law Center, 1212 North Eastman Road
P. O. Box 3740
Kingsport, TN 37664

Re: Communications Workers of America, AFL-CIO v. United Inter-Mountain Telephone Company, No. 88-463

Dear Mr. Kramer:

Your request of October 4, 1988, for an extension of time within which to file a brief in opposition to the petition for a writ of certiorari in the above-entitled case has been granted; your time has been extended to and including November 18, 1988.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk
By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

kb
cc: Laurence Gold, Esquire